87-74

No. _____

In the

Supreme Court of the United States

October Term, 1987

BRYAN MEMORIAL HOSPITAL,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

Is the right of employees to change their mind about union representation as important as the right of a union to represent employees?

II.

Whether an employer with a good faith doubt that a union no longer represents a majority of its employees must *also* show actual loss of majority support in order to withdraw recognition from the union?

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Bryan Memorial Hospital prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion issued by the Court of Appeals is reported at 814 F.2d 1259 (8th Cir. 1987), and is reproduced in Appendix A of this Petition. The decision and order of the National Labor Relations Board issued on April 9, 1986, is reported at 279 NLRB No. 39, and is reproduced in Appendix B of this Petition.

JURISDICTION

The Court of Appeals issued its opinion enforcing the order of the National Labor Relations Board on March 19, 1987. A petition for a rehearing was considered by the Court of Appeals and denied in an order entered April 14, 1987. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1970).

STATUTORY PROVISIONS INVOLVED

The statute involved is the National Labor Relations Act, as amended, 61 Stat. 136, 713 Stat. 519, 29 U.S.C. § 151 *et seq.* (1970). The relevant sections are 29 U.S.C. § 158(a)(1) and (5). The pertinent text is as follows:

> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title; . . .
>
> (5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 159(a) of this title.

STATEMENT OF THE CASE

I. Statement Of Facts

Bryan Memorial Hospital, a non-profit Nebraska corporation, is engaged in the operation of a health care facility in Lincoln, Nebraska. The Hospital employs approximately 1,400 employees, fewer than 400 of whom belong to the bargaining unit which is the subject of this case.

The Nebraska Nurses Association was certified as the exclusive collective bargaining agent for the bargaining unit in question on March 8, 1982. Initial bargaining proposals were exchanged by the parties between July and November, 1982, and the parties met for the purpose of collective bar-

gaining on thirty-five (35) separate occasions between August 3, 1982 and June 15, 1983. By April, 1983, the parties had arrived at tentative agreement on a substantial number of items. Nevertheless, the Union declared an impasse on April 27, 1983, and informational picketing took place at the Hospital from May 9 through May 13, 1983.

Bargaining resumed in May of 1983, and the parties continued to reach tentative agreement on several additional items including, on June 15, 1983, a maternity leave of absence policy. During negotiations the Union's negotiator made a statement in the presence of the Hospital's counsel that the Union had a membership of less than fifty percent (50%) of the employees in the bargaining unit. On May 31, 1983, a decertification petition was filed in NLRB Case No. 17-RD-912 by a group of employees in the bargaining unit who called themselves "Concerned Employees for a Better Bryan." Several letters were sent between the Hospital's counsel and the attorney who represented the employees who filed the decertification petition as to the strength of the showing of interest in support of the decertification petition.

At the conclusion of the bargaining session on June 15, 1983, numerous unresolved items remained at issue between the parties. On June 20, 1983, the attorney for the "Concerned Employees" group presented the attorney for the Hospital with affidavits attesting to the Union's loss of majority status and a demand that the Hospital withdraw recognition from the Union or face unfair labor practice charges[1] from the "Concerned Employees" group. Later

1. Section 8(a)(2) of the Act, 29 U.S.C. § 158(a)(2) (1970), prohibits an employer from recognizing a union supported by only a minority of the employees. Thus, failure to withdraw recognition is a violation of Section 8(a)(2). *ILGWU v. NLRB*, 366 U.S. 731, 738 (1961). In addition, in *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030 (8th Cir. 1976), the employer was found to have justification for refusing to recognize a union because one of the objective facts relied on by the employer for its bona fide doubt was:

> A letter from a local attorney stating that a large number of Royal's employees retained him to advise the company of their informed belief that the Union no longer represented a majority of employees at the plant and that if Royal negotiated with the Union, the employees would "take appropriate legal action to stop

the same day, the Hospital withdrew recognition from the Union. In addition, the Hospital filed a decertification petition in NLRB Case No. 17-RM-693 on June 27, 1983.

II. Proceedings Below

Unfair labor practice charges were filed on February 9, June 22, June 30 and August 4, 1983, by the Union against the Hospital. These charges did not claim that the Hospital was involved in "surface bargaining." Instead the charges centered on the Hospital's withdrawal of recognition from the Union based on its good-faith doubt as to its majority status and its subsequent changes in benefits. The National Labor Relations Board Regional Director for Region 17, issued a Complaint on March 31, 1983, and an Order Consolidating Cases and Consolidated Complaint on August 12, 1983.

The charges and Complaint alleged that the Hospital violated Sections 8(a)(1) and (5) of the National Labor Relations Act. The violations were alleged to consist of the Hospital's withdrawal of recognition from the Union as the exclusive representative for a unit of the Hospital's professional employees. The Hospital was also alleged to have made unlawful unilateral changes in its maternity leave policy and its health insurance plan for bargaining unit employees.

The matter came on for hearing before Administrative Law Judge (ALJ) Irwin H. Socoloff on October 31, and November 1, 1983. The ALJ issued his Decision on December 12, 1984, finding that the Hospital had violated Sections 8(a)(1) and (5) of the Act by unlawfully withdrawing recognition from the Union, and by unlawfully making unilateral changes in its maternity leave policy and health insurance plan for bargaining unit employees.

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such illegal recognition of the Union which had lost its majority support among the employees in the bargaining unit."

Id. at 1036.

The Hospital filed exceptions and a brief in support to the ALJ's Decision to the National Labor Relations Board.

The Board, in a decision and order dated April 9, 1986, affirmed the ALJ's rulings, findings, and conclusion, and adopted the ALJ's recommended Order.

On May 5, 1986, Petitioner filed a Petition for Review of the Board's Decision and Order with the U.S. Court of Appeals for the Eighth Circuit.

On March 19, 1987, the Court of Appeals entered its Judgment and Opinion, enforcing the Board's Order. On March 30, 1987, the Hospital filed a Petition for Rehearing. On April 14, 1987, the Court of Appeals issued an Order denying Petitioner's Petition for Rehearing.

On June 3, 1987, the Court of Appeals granted the Hospital's motion to recall mandate and stay issuance of mandate. The mandate was stayed to and including August 3, 1987. The stay is to be continued until final disposition by this Court.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS AND THE BOARD.

The primary question raised in this case is whether the right of employees who change their mind about union representation is as important as the right of a union to represent employees. This case also raises the question of whether an employer must prove actual loss of majority support in addition to a good-faith doubt to support its withdrawal of recognition from a union.

A. There is a Conflict Among the Circuits as to Whether the Burden of Proof Shifts to the General Counsel to Rebut the Employer's Showing of Good Faith Doubt.

The Court of Appeals, in holding that the Hospital was not justified in withdrawing recognition from the Union, failed to consider those Board and circuit decisions which shift the burden to the Board's General Counsel to prove the Union actually enjoyed majority status on the date recognition was withdrawn.

1. The Rule.

In *Celanese Corp. of America*, 95 NLRB 664 (1951), the Board first adopted the rule that a union's support by a majority of the employees in the bargaining unit is conclusively presumed for one year following the union's certification. The presumption of this support becomes rebuttable after the first year. The Board in *Celanese* also recognized that the employer's good faith belief of the union's loss of majority support constitutes a complete defense to an alleged Section 8(a)(5) [29 U.S.C. § 158(a)(5) (1970)] violation arising from a withdrawal of recognition:

> [W]hether the [employer] violated Section 8(a)(5) . . . depends, not on whether there was sufficient evidence to rebut the presumption of the Union's continuing majority status or to demonstrate that the Union in fact did not represent the majority of employees, but upon whether *the Employer in good faith* believed that the Union no longer represented the majority of the employees.

95 NLRB at 671 (original emphasis).

In *Celanese*, the Board adopted a two-pronged test in determining whether the employer's doubt was raised in good faith. The first prong of the test is that the issue must be raised in the absence of independent unfair labor practices. The other prong is that there must be sufficient objective considerations to provide reasonable grounds for the doubt.

If the employer meets this test, then it has a complete defense to the unfair labor practice charge and it has no further obligation to bargain. *See NLRB v. Dayton Motels, Inc.*, 474 F.2d 328, 332 (6th Cir. 1973) ("[E]ven if in fact the Union actually represented a majority of employees in the bargaining unit, the Company would still have a complete defense if it has a good-faith doubt about such representation. *NLRB v. Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968).").

Eight years later, the Board in *Stoner Rubber Co.*, 123 NLRB 1440 (1959), changed significantly the *Celanese* test, in holding that inasmuch as actual proof of majority is so peculiarly within the special competence of the union, production by the employer of evidence sufficient to cast "serious doubt" on the union's majority status would cause a presumption of majority to lose its force. *Id.* at 1445. Thus, the burden of proving actual majority on the date of the refusal to bargain would then shift to the General Counsel representing the union. *Id.* The Board in so finding stated:

> Proof of majority is peculiarly within the special competence of the union. It may be proved by signed authorization cards, dues checkoff cards, membership lists, or any other evidentiary means. An employer can hardly prove that a union no longer represents a majority since he does not have access to the union's membership lists and direct interrogation of employees would probably be unlawful as well as of dubious validity. Accordingly, *to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with evidence that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.*

Id. (original and added emphasis).

2. Application of the Rule by the Circuit Courts of Appeals.

Seven of the circuits have followed the approach enunciated in *Stoner*, which is to shift the burden to the General Counsel to establish majority status after a good faith doubt showing by the employer.[2]

However, three of the circuits have continued to follow the *Celanese* approach of placing the evidentiary burden on the employer.[3] One circuit has followed both approaches.[4]

3. Application of the Rule by the Board.

In addition, the Board decisions are in conflict.[5] In *Taft Broadcasting* the Board stated:

> In sum, we conclude that at the time it withdrew recognition, the [employer] had sufficient objective grounds for believing that a majority of employees no longer desired union representation. Since the *General Counsel failed to come forward with evidence that on the refusal-to-bargain date the Union in fact did represent a majority of the employees in the unit in question*, the allegations in the complaint are found to be without merit.

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2. *See, e.g., NLRB v. Frick Co.*, 423 F.2d 1327, 1330-31 (3d Cir. 1970); *NLRB v. Anvil Products, Inc.*, 496 F.2d 94, 96 fn. 3 (5th Cir. 1974); *Automated Business Systems v. NLRB*, 497 F.2d 262, 270-71 fn. 7 (6th Cir. 1974); *Orion Corp. v. NLRB*, 515 F.2d 81, 84-85 (7th Cir. 1975); *Bellwood Gen. Hosp., Inc. v. NLRB*, 627 F.2d 98, 104 (7th Cir. 1980); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974); *National Car Rental Sys., Inc. v. NLRB*, 594 F.2d 1203, 1207 (8th Cir. 1979); *Dalewood Rehabilitation Hospital, Inc. v. NLRB*, 566 F.2d 77, 80 (9th Cir. 1977); *NLRB v. Silver Spur Casino*, 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981); *Hotel, Motel and Restaurant Employees v. NLRB*, 785 F.2d 796, 799 (9th Cir. 1986); *Lodges 1746 & 743, Int'l Ass'n of Machinists & Aerospace Workers v. NLRB*, 416 F.2d 809, 811-812 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 1058 (1970); *Allied Industrial Workers, Local 289 v. NLRB*, 476 F.2d 868, 881 (D.C. Cir. 1973).

3. *See, e.g., Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir. 1975); *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *NLRB v. Leatherwood Drilling Co.*, 513 F.2d 270, 272 (5th Cir.), *cert. denied*, 423 U.S. 1016 (1975); *NLRB v. Dayton Motel, Inc.*, 474 F.2d 328, 331 (6th Cir. 1973).

4. *W & W Steel Co. v. NLRB*, 599 F.2d 934, 939 (10th Cir. 1979); *NLRB v. King Radio Corp.*, 510 F.2d 1154, 1156 (10th Cir.), *cert. denied*, 423 U.S. 839 (1975).

5. Compare *Taft Broadcasting*, 201 NLRB 801, 803 (1973) to *United Supermarkets, Inc.*, 214 NLRB 958, 959 fn. 10 (1974) and *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, 213 NLRB 651, 654 fn. 21 (1974).

201 NLRB at 803 (emphasis added and footnotes omitted).

One year later in *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n.*, the Board rejected *Stoner Rubber* and the conclusion of *Taft Broadcasting* which shifted the burden to the General Counsel to prove that on the critical date the union in fact represented a majority of the employees. 213 NLRB at 654 fn. 21. The Board stated: "We are constrained to add that our dissenting colleague (Member Kennedy) confuses the issue by his recitation of certain language in *Stone Rubber* . . . . which in any event was subscribed to by only two of the five members signing *Stone Rubber* . . . ." *Id.*

In the same year in *United Supermarkets* the Board was critical of the proposition from *Taft Broadcasting* that when an employer shows objective grounds for doubting a union's continuing majority the General Counsel may prove a violation of § 8(a)(5) by submitting independent proof of the union's actual majority status. 214 NLRB at 959 fn. 10. According to the Board, "Member Kennedy's position on the legal basis for the *Taft Broadcasting* decision . . . is his alone." *Id.*

Recently, Board Member Babson, in *Von and Sons, Inc.*, 281 NLRB No. 144 (Sept. 30, 1986), agreed with the ALJ's conclusion that the company did not have a good faith doubt of the union's majority status. However, relying on *Bartenders, Hotel, Motel and Restaurant Employers Bargaining Ass'n*, Board Member Babson considered it "unnecessary to rely on the judge's finding that the General Counsel affirmatively proved that the Union in fact enjoyed majority status." Slip opin. at 1 fn. 1.

4. Comments on the Rule.

It has been suggested that "[a]n incumbent union is in a much better position to prove majority support." Comment, "Application of the Good-Faith-Doubt Test to the

Presumption of Continued Majority Status of Incumbent Unions," 1981 *Duke L. J.* 718, 736 (1981). To support this proposition the commentator contends:

> In contrast to the employer's position, the union can freely question employees about their union sentiment. Such questioning is not regarded as coercive of employee free choice because the union's relationship with employees is different from the employer's. Because an employer controls the employee's livelihood, he usually has considerable power over his employees. The implicit threat of discharge is always present. Although the union may have some control over the employees, it cannot fire them, at least directly. Union questioning of employees therefore is not as oppressive as employer questioning. Furthermore, a union's awareness of the extent of employee support is important in determining the union's bargaining leverage in negotiations with the employer. Most unions, therefore, probably are keenly aware of the extent of their support. Indeed, the union benefits from keeping any loss of employee support confidential; an employer cannot gain bargaining leverage if he does not know when the union loses majority support. The union also has access to its own files, which may aid it in determining the extent of employee support. On balance, the union is in a much better position than the employer to bear the burden of proof on the issue of majority status. The importance of correctly determining the majority-status issue should lead the Board to require the union to bear the burden of proof.

Id. at 736-37 (footnotes omitted).

In concluding, he stated:

> Application of the good-faith-doubt test as used by the Board in *Stoner* and the court in *Bellwood* [*Gen. Hosp., Inc. v. NLRB*, 627 F.2d 98 (7th Cir. 1980)] is warranted. If the employer cannot meet this minimal standard, the Board is justified in entering a bargaining order. If, however, the employer's doubts are both reasonable and in good faith, *the Board* should find that the presumption of majority support has been rebutted, and *should enter a bargaining order only if the union persuades the Board that its majority status still exists. This standard of proof strikes the proper balance, as*

determined by Congress, between the goal of employee free choice and the goal of industrial stability.

The suggested approach probably will result in higher union turnover. Only those unions that truly command majority support will be allowed to represent employees. Unsupported, albeit entrenched, unions no longer will burden employee units simply because the unions previously commanded majority support. The suggested approach may even lead to less unionization. But under the Act the question of unionization always has been left to those most significantly affected by that determination: the employees. *The Board has lost sight of this consideration, forcing its preference for industrial stability upon employee units, rather than deferring to the employees and fulfilling its congressionally-prescribed role.*

Id. at 742 (emphasis added and footnote omitted).

Another commentator has concluded:

As applied, the *Celanese* 'good faith doubt' defense to a section 8(a)(5) allegation has almost invariably been found to be unsupported by sufficient objective evidence of the union's loss of majority support unless the employer, possessing such doubt, has relied upon objective evidence that establishes an *actual* loss of majority support by the union.

Weeks, "The Union's Mid-Contract Loss of Majority Support: A Waivering Presumption," 20 *Wake Forest L. Rev.* 883, 889 (1984) (emphasis added and footnotes omitted).

This commentator further found:

[P]roof of such an *actual loss of majority support is virtually impossible for the employer to obtain* in many cases *as a result of the Board's construction of the Act.*[29]

29. An employer having reason to suspect that the union may no longer be supported by his employees is denied access to several of the more obvious means by which it might verify this loss of majority backing and acquire sufficient objective facts to support its withdrawal of recognition by the Board's interpretation of the Act. Thus, individual questioning of employees to determine whether they support the union violates section 8(a)(1), and any evidence of a loss of majority support based on such a violation cannot be relied upon. *E.g., Retired Persons Pharmacy v. NLRB*, 519 F.2d 486 (2d Cir. 1975). The most obvious direct means of establishing objective support would seem to be a poll or secret ballot election conducted by the employer. These methods are, in the Board's view, violations of section 8(a)(1) and their results therefore cannot be relied upon unless, prior to the election or poll, the employer already possesses sufficient objective support to jus-

tify withdrawal of recognition. *E.g.*, *Mid-Continent Refrigerated Serv. Co.*, 228 N.L.R.B. 917 (1977).

The Board's policies precluding direct evidence of a loss of majority support also have been extended to circumstantial evidence. Indications of employee sentiment such as the failure of a majority to join the union, the union's loss of a deauthorization election, a large number of employees revoking their "check-off" authorization to have union dues withheld from their paychecks, or employee statements of dissatisfaction with the union are most often viewed as inconclusive on the question of the employees' continued desire for union representation. *See, e.g.*, *Bellwood Gen. Hosp., Inc. v. NLRB*, 627 F.2d 98 (7th Cir. 1980) (seventy percent employee turnover, employee statements of dissatisfaction with union, improperly elected union officials, and lack of grievances held insufficient to establish loss of majority support); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293 (9th Cir. 1978) (employee dissatisfaction with the union, high employee turnover rate, lack of union activity in processing grievances, low meeting attendance and union membership, and union financial difficulties held insufficient evidence of loss of majority support), *cert. denied*, 442 U.S. 921 (1979); *Terrell Mach. Co. v. NLRB*, 427 F.2d 1088 (4th Cir.) (isolated reports from unidentified sources of employee dissatisfaction with union, low union membership, and low numbers of employees in bargaining units held insufficient to support employer's good faith doubt of continued majority support), *cert. denied*, 398 U.S. 929 (1970). *Overturning prior policy, the Board recently held that the filing of a decertification petition by the employees is also insufficient as an indication that the union has lost majority support. Dresser Indus., Inc.*, 264 N.L.R.B. 145 (1982). Finally, even when the employees are on strike and the employer hires replacements who defy the union's picket line to work during the strike, the Board has adopted the presumption that the replacements support the union to the same extent as the striking employees. *E.g.*, *Cutten Supermarket*, 220 N.L.R.B. 507, 509 (1975).

Id. at 889-890 (emphasis added). *See also American Mirror Co., Inc.*, 277 NLRB No. 179, slip opin. at 3-4 (Jan. 13, 1986) (company lawfully polled employees after a "reasonably grounded doubt about the Union's continued majority status"); *Ming Tree Restaurant, Inc. v. NLRB*, 736 F.2d 1295, 1297 (9th Cir. 1984) (rejecting Board's reasoning for prohibiting employer-sponsored poll stating "[b]y the Board's reasoning, an employer in doubt of the union's majority status would be allowed to take a poll only when it had no actual need to do so, that is, when it already had sufficient objective evidence to justify withdrawal of recognition.").

5. Application of the Rule in this Case.

In the instant case, the General Counsel did not ever supply any evidence to contradict the Hospital's evidence rebutting the presumed majority status. Thus, the Board and the Circuit Court of Appeals erred in refusing to follow those decisions requiring such an evidentiary showing by

the General Counsel who is in a much better position to prove majority support.

B. There is a Conflict Among the Circuits on the Amount of Evidence Sufficient to Establish a Reasonable Doubt.

1. The Different Standards.

The Hospital argued before the Board and the Circuit Court that its withdrawal of recognition was based on objective evidence. The Board concluded that the evidence presented by the Hospital did not support a reasonable good-faith doubt. The Eighth Circuit Court of Appeals agreed. There is a conflict among the circuits on the amount of evidence which is required to establish a reasonable doubt.

Four circuits have required "clear, cogent and convincing evidence" to establish an employer's reasonable doubt.[6] Five circuits have required the less stringent standard of "reasonable basis."[7]

2. Application of the Different Standards.

The following two circuit court decisions involving very similar factual circumstances, which were decided under the *Celanese* and *Stoner* standards, reveal the actual difference between the standards in practice.

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6. *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 489-90 (2d Cir. 1975); *J. Roy McDermott & Co. v. NLRB*, 571 F.2d 850, 859 (5th Cir.), *cert. denied*, 439 U.S. 893 (1978); *Orion Corp. v. NLRB*, 515 F.2d 81, 85 (7th Cir. 1975); *Bellwood Gen. Hosp., Inc. v. NLRB*, 627 F.2d 98, 102 (7th Cir. 1980); *NLRB v. Tahoe Nugget, Inc.*, 584 F.2d 293, 297 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); and *NLRB v. Silver Spur Casino*, 623 F.2d 571, 579 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981).

7. *Terrell Machine Co. v. NLRB*, 427 F.2d 1088, 1090 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970); *Automated Business Systems v. NLRB*, 497 F.2d 262, 270 (6th Cir. 1974); *NLRB v. Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (8th Cir. 1969); *National Car Rental Sys., Inc. v. NLRB*, 594 F.2d 1203, 1207 (8th Cir. 1979); *NLRB v. King Radio Corp.*, 510 F.2d 1154, 1156 (10th Cir.), *cert. denied*, 423 U.S. 839 (1975); *W & W Steel Co. v. NLRB*, 599 F.2d 934, 939 (10th Cir. 1979); *Retail, Wholesale and Dep't. Store Union v. NLRB*, 466 F.2d 380, 393 (D.C. Cir. 1972).

In *Tahoe Nugget, supra,* the employer withdrew recognition from the union and defended the resulting allegation of a Section 8(a)(5) violation by attempting to establish its reasonable doubt of the union's majority. 584 F.2d at 296. As objective support for this doubt, the employer relied upon: (1) employee complaints about the union; (2) high employee turnover; (3) the union had not processed any grievances; (4) union agents inspected the business premises infrequently; (5) no employees attended a meeting called by the union; (6) union membership was relatively low; (7) the union was placed in the trusteeship; and (8) a good previous bargaining history with the union. *Id.* at 304-08. In spite of these factors, the Board, and later the Ninth Circuit, found the evidence inconclusive of a loss of majority support. *Id.* at 308. Both tribunals evaluated the employer's justifications to determine the extent to which they were probative of an *actual loss* of majority support, instead of deciding whether they were a reasonable basis on which the employer might have formed a good faith doubt of majority support. *Id.* at 304.

However, in *Bellwood, supra,* the Seventh Circuit considered similar indications of a loss of majority support and reached a different result. The employer had withdrawn recognition and attempted to establish a defense to the refusal to bargain charge by relying upon a number of factors similar to those listed in *Tahoe Nugget* as objective support for a good faith doubt. 627 F.2d at 100. The employer in *Bellwood* relied on: (1) a seventy percent turnover in employees subsequent to certification; (2) statements by employees concerning their dissatisfaction with the union; (3) lack of properly elected union officers; (4) extremely low attendance at union meetings; (5) lack of grievances during first contract term; and (6) the union's failure to visit the hospital or use the bulletin board. *Id.* at 101-03. In contrast to the approach of the Board and the Ninth Circuit in *Tahoe Nugget,* the Seventh Circuit sharply distinguished

the good faith doubt test from the issue of *actual loss* of majority support. Although admitting, *arguendo*, that the evidence presented might not show an actual loss of majority support, the court concluded that the factors relied on did justify the employer's good faith doubt and thereby rebutted the majority support presumption. *Id.* at 104. The burden then shifted to the General Counsel to establish the union's actual majority support. *Id.*

3. The Board's Application of the Standard.

In *Automated Business Systems v. NLRB*, 497 F.2d 262 (6th Cir. 1974), the court found the Board tests different: one is subjective and the other objective. The court stated:

> In *Celanese*, the Board applied a good faith doubt test in determining whether an employer was justified in refusing to bargain with the union. The Board held that a good faith doubt of the union's majority was a complete defense to § 8(a)(5) unfair labor charges, regardless of the actual majority status of the union. While the Board indicated that some basis in fact must exist to support the employer's doubt, the test was largely subjective. In *Stoner*, emphasis was placed on the production of evidence to cast a serious doubt on the union's majority status. This test is substantially an objective test.

Id. at 271 fn. 7.

Recently, the Board in *Royal Vending Services*, 275 NLRB 1222 (1985), found the Ninth Circuit Court of Appeals had set forth standards for judging "objective considerations" which were more stringent than the tests currently articulated by the Board. The Board stated:

> The [administrative law] judge, relying on *Premium Foods v. NLRB*, 709 F.2d 623 (9th Cir. 1983), found that the Respondent failed to establish a reasonable good-faith doubt of the Union's majority status because the Respondent did not present evidence which unequivocally indicated that the Union's support had declined to a minority. *In the past, the Board has not required proof of minority status to establish an employer's good-faith doubt of union majority status.* Rather,

> on expiration of the union's first year following certification, the Board permits the employer to show either that the union did not enjoy majority status at the time of the refusal to bargain or that it had a good-faith and reasonably grounded doubt, based on objective considerations, for believing that the union had lost its majority status when it refused to bargain.

275 NLRB at 1222 fn. 1 (emphasis added).

In *Wilshire Foam Products, Inc.*, 282 NLRB No. 158 (Feb. 9, 1987), the Board adopted an administrative law judge's decision which found:

> The question exactly what circumstances may create such *'objective considerations' is not categorically answered in the cases. And there may exist some differences between the Board and reviewing courts about how strictly the tests in this area should be applied.*

Id., JD slip opin. at 3 (footnotes omitted and emphasis added).

The administrative law judge further found:

> Respondent could lawfully withdraw recognition if it showed either that the Union 'actually lacked' majority status or, alternatively, that it entertained a 'good faith doubt' based on 'objective considerations' that such was the case. *Exactly what it takes to meet the former showing is difficult to discern from the precedents,* . . . .

Id. at 31 (emphasis added).

4. Comments on Application of the Standard.

One commentator has concluded on the issue of sufficiency of evidence of employer doubt:

> The amount of evidence sufficient to establish a reasonable doubt and thus overcome the presumption of majority is one source of uncertainty under the current Board approach. The objective criteria are often ambiguous. Furthermore, assessing the evidence in light of the circumstances of each case leads to conflicting results in factually similar situations, and makes it difficult to determine which evidence is dispositive of a given case.

Note, "NLRB Determination of Incumbent Unions' Majority Status," 54 *Ind. L. J.* 651, 656 (1979) (footnotes omitted).

Another commentator has concluded:

> The Board's current approach of placing a heavy burden on the employer to prove what it calls good-faith doubt may result in the Board ordering an employer to bargain with a minority union, merely because the employer is unable to prove that the union lacks majority support. This result does not strike the balance between the goals of employee free choice and industrial stability that the Act contemplates.

Comment, "Application of the Good-Faith-Doubt Tests to the Presumption of Continued Majority Status of Incumbent Unions," 1981 *Duke L. J.* 718, 729 (1981).

This commentator further found:

> Because a bargaining order has such important consequences for employee free choice, the Board should not enter an order unless it determines, by a preponderance of the evidence, that the incumbent union has majority support. By placing the burden on the employer to disprove the union's majority status, the Board creates the substantial possibility that a bargaining order will direct an employer to bargain with a minority union, thereby contravening the statutory policy of employee free choice. An employer is in a difficult, if not impossible, position to disprove an incumbent union's majority status. First, the employer is required to prove a negative--that the union no longer commands majority support. Second, as the Board explained in *Stoner*, '[p]roof of majority is peculiarly within the special competence of the union.' The employer has limited or no access to union files and records. Moreover, the employer places himself in an extremely precarious position if he questions employees regarding their union sentiment. Such questioning is inherently repugnant to employee free choice and in many situations constitutes a violation of section 8(a)(1) of the Act. An employer cannot, for instance, lawfully conduct a poll of his employees to determine union sentiment unless the poll complies with stringent procedural safeguards and the employer has a good-faith doubt concerning the union's majority status. Since good-faith doubt is a prerequisite to

> conducting a lawful poll, such a poll cannot be used to establish good-faith doubt in either an election or an unfair labor practice proceeding. An employer therefore is limited in the kinds of evidence he can generate to disprove the union's majority status; the evidence necessarily will be circumstantial and usually will be equivocal.

Id. at 733-734 (footnotes omitted).

Finally, yet another commentator has found that in *Celanese* it was the employer's good faith doubt, not a showing of an actual loss of majority support, that constituted the basis for rebutting the presumption. However, the Board and some of the circuits have "concluded that the inquiry is no longer even ostensibly directed to the sincerity of the employer's doubt, and all emphasis is placed on whether the 'objective support' offered by the employer as supporting its doubt is sufficient to establish an actual loss of majority support, and may well be questioned whether the Board has not, over time, effectively overruled this aspect of *Celanese*." Weeks, "The Union's Mid-Contract Loss of Majority Support: A Waivering Presumption," 20 *Wake Forest L. Rev.* 883, 890 fn. 30 (1984).

5. Application of the Standard in this Case.

In the instant case, the Hospital presented evidence (employee affidavits) establishing a reasonable good faith doubt. The Board and the Circuit Court in not finding for the Hospital seem to be placing a burden on the employer to show more than reasonable good faith doubt. The Board and some of the circuit courts seem to require evidence nothing short of a showing of actual loss of majority support. This Court needs to address whether the good faith doubt standard can still be relied upon by employers in withdrawing recognition.

II. CERTIORARI SHOULD BE GRANTED TO ALLOW THIS COURT TO ANSWER IMPORTANT QUESTIONS OF FEDERAL LABOR LAW WHICH HAVE NOT YET BEEN SETTLED BY THIS COURT.

A. This Case Raises an Important Question, Previously Unanswered by this Court, Concerning an Employer's Withdrawal of Recognition of a Union as a Bargaining Agent Based on its Good Faith Doubt as to the Union Still Representing a Majority of the Employees.

This case presents an opportunity for this Court to address questions which have been addressed many times by the Board and circuit courts with differing results. Thirty-three years ago this Court first noted the good faith doubt standard adopted by the Board. *Brooks v. NLRB*, 348 U.S. 96 (1954).

In *Brooks* the Court approved a National Labor Relations Board rule requiring that a certification be honored for a period of one year, absent unusual circumstances. 348 U.S. at 98. The Court also indicated that:

> *[T]he Board has ruled that one year after certification* the employer can ask for an election or, *if he [employer] has fair doubts about the union's continuing majority, he [employer] may refuse to bargain further with it.* This too, is a matter appropriately determined by the Board's administrative authority.

348 U.S. at 104 (emphasis added).

Since that decision the Board and the Courts of Appeals have often had occasion to address the burden of proof in refusal to bargain cases. For example, in *Orion Corp. v. NLRB*, 515 F.2d 81 (7th Cir. 1975), the Seventh Circuit Court of Appeals found:

> *There are two lines of cases*, one emphasized in the Board's order relying on *Terrell* and the other in the Company's

brief relying on *Stoner*. The *Terrell* approach holds that the presumption of continued majority is 'sufficient to establish *prima facie* a continuing obligation to bargain' (427 F.2d at 1090), or in the words of this court, following *Terrell*,

> 'The effect of the presumption is merely to require the employer to bargain with the previously recognized representative unless it can show (1) that the union in fact has lost its majority, or (2) at the least, that reasonable grounds exist for good faith doubt as to continuing majority support for the representative. Celanese Corp., 95 NLRB 664 (1951); Terrell Machine Co. v. NLRB, *supra*.' Zim's Foodliner, Inc. v. N.L.R.B., [495 F.2d 1131,] . . . 1139 [(7th Cir. 1974)].

The *Stoner* approach varies this formulation slightly:

> '. . . to overcome the presumption of majority the employer need only produce sufficient evidence to cast serious doubt on the union's continued majority status. The presumption then loses its force and the General Counsel must come forward with *evidence* that on the refusal-to-bargain date the union in fact did represent a majority of employees in the appropriate unit.' 123 N.L.R.B. at 1445 (emphasis in original).

515 F.2d at 84 (emphasis added).

This case presents the opportunity for this Court to give employers, the Board, and the Courts of Appeals definitive guidance on standards for judging "objective considerations" which lead an employer to a "good faith doubt" as to a union's majority status. The Court should take this opportunity to do so in view of the substantial importance the case has in the application of the Act to unions, workers, employers, and in view of the differing standards within the Courts of Appeals below on this issue.

B. The Board's Dresser Standard Infringes Upon Employee Free Choice.

The Court of Appeals' decision sustains the Board's new view that the filing of a decertification petition does not by itself provide sufficient basis for doubt about a union's con-

tinued majority status. *Dresser Industries, Inc.*, 264 NLRB 1088 (1982). In *Dresser*, the Board held that it was unlawful for an employer to cease bargaining solely because a decertification petition had been filed. *Id.* at 1088-89. *Dresser* expressly overruled the principal established by the Board ten years earlier in *Telautograph Corp.*, 199 NLRB 892 (1972).

In *Telautograph Corp.*, *supra*, the Board held that the timely filing of a decertification petition justified an employer's refusal to bargain with an incumbent union. The Board's decision was premised upon the Board's belief that prohibiting any bargaining with the incumbent union was necessary to insure employer neutrality and to facilitate employee free choice in the pending election. *Id.* at 893.

The justification for an employer's withdrawal of recognition due to the filing of a decertification petition was explained by the Board's (then) Chairman Van De Water in his dissenting opinion in *Dresser Industries* as follows:

> I find the logic of *Telautograph* compelling. Furthermore, for the same reasons I argued in *RCA Del Caribe* [262 NLRB 963 (1982)] that the majority's position permitted employees' choice of a bargaining representative to be influenced improperly, *I believe that the majority here, by allowing collective bargaining to continue during the pendency of a real question concerning representation raised by the decertification petition, will frustrate the exercise of the employees' free choice* - a right which is this Board's duty to guarantee. The principle of employer neutrality known as the *Midwest Piping* [*and Supply Co.*, 63 NLRB 1060 (1945)] doctrine better serves the goal of ensuring employees the right to select freely whether they wish to be represented by a union. . . . Accordingly, I would find that [the employer's] refusal to bargain with the Union was justified by the filing of the decertification petition.

264 NLRB at 1090 (emphasis added and footnote omitted).

Decertification petitions are held in abeyance if certain unfair labor practice charges, including refusal-to-bargain charges, have been filed against the employer. These unfair

labor practice charges are known as "blocking charges" because they temporarily block any attempt to hold an election. An election is not held until the unfair labor practice charges are resolved.

One commentator has suggested this practice by the Board also infringes on employee free choice. *See* Comment, "Application of the Good-Faith-Doubt Test to the Presumption of Continuing Majority Status of Incumbent Unions," 1981 *Duke L. J.* 718, 737 (1981). According to this commentator:

> When an employee election petition is filed and the employer discontinues bargaining, an incumbent union, unsure of its majority status, probably will file a refusal-to-bargain charge to block the election. In so doing the union hides its possible loss of majority status behind the employer's burden of proof, rather than risking an unfavorable election result. *Under current Board standards the employer is often unable to satisfy this burden in the unfair labor practice proceeding even when the union has lost majority support.* In such a case a bargaining order issues and the employee petition is not processed further. The union succeeds in maintaining its representative status although it no longer commands majority support. The employees are saddled with a representative they no longer desire. If the Board places the burden of proof on the union, however, unions would have little to gain by avoiding an election. A union's loss of majority support probably would be exposed in either an election or an unfair labor practice proceeding.
>
> Requiring employers to prove that an incumbent union has lost its majority support simply cannot be justified on the basis of promoting employee free choice. *Employee free choice is better preserved by placing the burden of proving majority status on the union.*

Id. at 737-38 (emphasis added and footnotes omitted).

This commentator in reviewing the balance between employee free choice and industrial stability found:

> The Act states clearly that the goal of industrial stability must be balanced against the employees' right to choose

> their bargaining representative. Both employee free choice and industrial stability are safeguarded by sections 8(a)(2) and 8(a)(5) of the Act. *The Supreme Court has interpreted section 8(a)(2) as generally prohibiting employer recognition of a minority union* [*ILGWU v. NLRB*, 366 U.S. 731 (1961)]. Section 8(a)(5) compels recognition of a majority union. In theory the two sections are harmonious, but an employer often cannot know whether he is dealing with a minority or a majority union. In such situations the employer must decide whether to continue bargaining, risking a violation of one of the two sections if his decision is incorrect. The Board's task is to guide the employer in the direction most closely satisfying the policies underlying the Act. *The Board has ignored section 8(a)(2) in the incumbency situation, however, by compelling the employer to resolve all doubts in favor of recognition in order to avoid an 8(a)(5) violation. In addition, by placing the burden of disproving majority status on the employer in 8(a)(5) cases, the Board has rendered section 8(a)(2) ineffective in the incumbency context.*
>
> The Board's discretion in fashioning remedies and determining substantive law is limited when the policies of the Act are relatively clear. *In enacting the Act, Congress weighed employee free choice against industrial stability and determined that the goal of employee free choice outweighs the goal of industrial stability when a union no longer commands majority support.* The Board should not independently weigh these two policies and apply a rule that is inconsistent with the policy balance mandated by Congress.
>
> *The Board has contravened this mandate, however, by favoring industrial stability over employee free choice.* To administer Congress's espoused policy faithfully, the Board should apply a standard that ensures an accurate determination of actual majority status. Requiring the union to bear the burden of proving majority status accomplishes this goal.

Id. at 739-40 (emphasis added and footnotes omitted).

In the instant case the Hospital submits that the Section 7, 29 U.S.C. § 157 (1970), rights of its employees will be more effectively protected by a return to the standard announced in *Telautograph*. By adopting this standard the fil-

ing of a valid decertification petition raising a real question concerning representation would allow and require the employer to refrain from bargaining with the Union until the question is resolved by means of a Board-conducted secret ballot election.

C. The Board's Approach in Cases of this Type Violates Section 10(b) of the Act.

The Board's rule, enforced by the Circuit Court, requiring the Hospital to establish minority support violates the Federal Rules of Evidence. Section 10(b) of the Act, 29 U.S.C. 160(b) (1970), requires that the Board proceedings "shall, so far as practical, be conducted in accordance with the rules of evidence applicable in the district courts of the United States. . . . " The words "so far as practicable" have been construed not to allow easy escape from the congressional purpose in requiring such compliance, which is to ensure greater possibility of judicial review. *General Engineering, Inc. v. NLRB*, 341 F.2d 367, 374 (9th Cir. 1965). Even though the Board is permitted discretion in applying such rules, it must still address the evidentiary issues when it violates evidentiary rules. *Teamsters Local Union 769 v. NLRB*, 532 F.2d 1385, 1392 (D.C. Cir. 1976); *Sears, Roebuck & Co.*, 224 NLRB 558, 559 (1976) (relying on the rationale of Federal Rules of Evidence in dealing with a state dead man's statute). Particularly when the congressional intent of a rule is made clear by ample legislative history, *e.g.*, *H. Rep. No. 650*, 93d Cong., 1st Sess. 7 (1973), the Board should be bound thereby or give compelling explanation for its noncompliance.

Fed. R. Evid. 301 (1975) states that a "presumption imposes on the party against whom it is directed only the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion. . . . " One commentator has concluded "[b]ecause the bases of the

Board's presumption are weak, only a minimum of evidence should be required to rebut it. That the presumption instead effectively places the burden of disproving majority status on the employer, by allowing the General Counsel to rely solely on the presumption to establish majority, suggests the present Board rules are not only unfair, but in violation of the spirit of Federal Rule of Evidence 301." Note, "NLRB Determination of Incumbent Union's Majority Status, 54 *Ind. L. J.* 651, 660 (1979) (footnotes omitted)."

This commentator further found:

> This so-called 'bursting bubble' presumption is based on the congressional view that permanently altering the burden of persuasion, as does the current Board test, gives too great a force to presumptions. [*H.R. Rep. No. 650*, 93d Cong., 1st Sess. 7 (1973).] Thus, the Board's current approach overemphasizes the probative effect of prior majority status.

Id. at 661 (footnote cited in text).

A similar issue was resolved by this Court in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). In *Burdine*, this Court in an employment discrimination suit brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.*, addressed the evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the employer. This Court found that the employer does not also bear the burden of persuading the factfinder. According to the Court, "This exceeds what properly can be demanded to satisfy a burden of production." 450 U.S. at 257.

Applying the Court's analysis to the present case, the General Counsel establishes a prima facie case by relying on the presumption of majority support. The Hospital then has the burden of producing evidence that establishes a good faith doubt of the Union's majority support. Finally, the General Counsel, who retains the burden of persuasion, must affirmatively prove that the Union in fact enjoyed majority status on the date of withdrawal. However, as previ-

ously described, the courts of appeals are in conflict as to the respective burdens of proof. The courts of appeals have improperly shifted the burden of persuasion from the General Counsel to the employer, in requiring a showing of actual loss of majority support.

In the instant case the Hospital contends that to overcome the presumption of majority status it need only establish a reasonable good faith doubt and not actual loss which should be the General Counsel's burden.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should be issued by this Court to review the judgment of the U.S. Court of Appeals for the Eighth Circuit in this matter.

Respectfully submitted,

BRYAN MEMORIAL HOSPITAL,
Petitioner

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Dated at Lincoln,
Nebraska this 10th
day of July, 1987.

APPENDIX "A"

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 86-1549

BRYAN MEMORIAL HOSPITAL, Petitioner,	)	
v.	)	Petition for Review of an Order of the National Labor Relations Board
NATIONAL LABOR RELATIONS BOARD, Respondent.	)	

Submitted: February 9, 1987

Filed: March 19, 1987

Before McMILLIAN and FAGG, Circuit Judges, and WOODS,* District Judge.

McMILLIAN, Circuit Judge.

Bryan Memorial Hospital (the Hospital) appeals from an order of the National Labor Relations Board (the Board). The Board cross-petitions for enforcement of the order. The Board held that the Hospital had violated § 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5), by withdrawing recognition from the Nebraska Nurses Association (the Union) and by unilaterally changing its maternity leave policy and employee insurance bene-

* The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, sitting by designation.

fits. For the reasons stated below, we deny the petition for review and enforce the order of the Board.

The Hospital is located in Lincoln, Nebraska. On March 8, 1982, the Union was certified as the collective bargaining representative for a bargaining unit of approximately 400 nurse/employees. Throughout all relevant time periods, the Hospital has had a written leave of absence policy that covers employee absences due to pregnancy.[1] In practice, however, the Hospital has enforced a more liberal policy for maternity leave. Under the unwritten policy, employees have automatically been allowed up to 90 days maternity leave at the employee's discretion and time without regard for the Hospital's staffing requirements. Further, the Hospital has not required employees on maternity leave to produce physicians' statements and has permitted them to return to their former jobs without question after the leave. Employees on maternity leave have also been given other benefits. Under the unwritten maternity leave policy, full-time pregnant employees have been allowed to transfer to part-time status late in pregnancy and then, close to the time of delivery, have been returned to full-time status. Because only full-time employees can use accrued sick leave during a leave of absence, this arrangement allowed the employee to use her accrued sick time on maternity leave. Further, employees on maternity leave have been allowed to stretch out the rate at which they use up sick leave during the leave.[2]

There was evidence that during the period from mid-1982 to February 1983, the Hospital changed the terms

1. The written policy states that leaves of absence are granted at the discretion of management and that return to work following a leave depends on the availability of jobs. An extended illness leave for employees who have exhausted their sick leave benefits may not exceed three months; this extended illness leave provision covers pregnancy. An employee on extended illness leave must present a physician's statement at the time he or she requests leave and when he or she returns to work.

2. The advantage to the employee of stretching out the rate at which accrued sick leave is used is that until the accrued time is exhausted, the Hospital continues to pay health insurance premiums for the employee.

under which employees could take maternity leave. It was stipulated that the Hospital did not consult with the Union about these changes. Although the changes were applied in an erratic and unclear manner, employees taking maternity leave during this time testified that they did so under more restrictive provisions.

In February 1983, the Union filed an unfair labor practice charge over the unilateral changes in the maternity leave policy. The Hospital then reinstated its practice of permitting more liberal maternity leave and the complaint was settled by agreement of the parties on May 9, 1983.

While the settlement agreement was awaiting approval by the Regional Director, a decertification petition was filed by a group of Hospital employees. The day after the petition was filed, the Hospital contacted the attorney for the employees' group and requested verification that the Union no longer enjoyed the support of a majority of employees within the bargaining unit. The attorney replied, stating that the decertification petition was supported by substantially more than 30 percent of the bargaining unit employees.[3] The attorney said that he had contacted virtually all the employees in the bargaining unit and that a majority of those employees did not want the Union. Several days later, the Hospital again contacted the attorney, seeking further support for his claims. The attorney responded by sending the Hospital affidavits from 11 members of the bargaining unit. The language of the 11 affidavits was identical. Each affiant stated that she had spoken to a certain number of other unit employees who told the affiant that they either did not want the Union to represent them or that they wanted a new election. On their face, the 11 affidavits claim to represent the views of 225 of the approximately 400 employees in the bargaining unit. The names of the 225 em-

3. The National Labor Relations Board will order a decertification election only where 30 percent or more of the bargaining unit employees no longer support the certified union. 29 C.F.R. § 101.18(a).

ployees, however, were not disclosed. Each affidavit stated: "[A]ffiant can identify those individuals, but chooses not to do so, because they have expressed a desire for anonymity and confidentiality, and therefore affiant will not disclose their names at this time." The attorney for the employee's group told the Hospital that the affidavits documented his claim that a majority of the bargaining unit employees had withdrawn support from the Union.

Upon receiving this letter and the attached affidavits, the Hospital immediately withdrew recognition from the Union and ceased bargaining. Several days later, the Hospital made unilateral changes in health insurance benefits available to employees in the bargaining unit. The Regional Director then withdrew approval of the agreement settling the earlier complaint and issued a second complaint alleging that the Hospital had unlawfully refused to bargain with the Union and had made further unilateral changes in the terms and conditions of employment. The cases and charges were consolidated.

The Hospital contends on appeal that it was justified in withdrawing recognition from the Union. A certified union enjoys a presumption that its majority representative status continues. *Terrell Machine Co.*, 173 N.L.R.B. 1480 (1969), *enf'd*, 427 F.2d 1088 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970). That presumption is irrebuttable for the first year following certification. After the first year, the presumption of majority status continues but may be rebutted. *Id.* at 1480-81. An employer who has refused to bargain with a certified union may rebut the presumption by showing that its refusal to bargain was predicated on a reasonable good faith doubt about the union's continued majority status. *Id.* The asserted doubt must be based on objective considerations. *Id.* The existence of reasonable good faith doubt is determined on the totality of circumstances in the particular case. *Sofco, Inc.*, 268 N.L.R.B. 159, 159-60 (1983).

In the present case, the Hospital asserts that it had such a reasonable good faith doubt in the Union's continued majority support based on the documented claims of the dissident employee's group, including the 11 affidavits, and the filing of the decertification petition. We consider first the claim that the documentation provided by the dissident employees' group was objective evidence justifying a reasonable good faith doubt. The Board concluded in its decision that the assurances of the attorney for the dissident employees' group and the 11 affidavits did not support a reasonable good faith doubt. We agree. The affidavits reliably express only the views of the named affiants and otherwise convey only unverified claims about the views of anonymous individuals. Even on their face, the affidavits do not assert that a majority of the employees whose views are said to be represented have withdrawn support from the Union. The affidavits merely state that the anonymous employees either do not want the Union *or* want a new election. There are no other features of the affidavits that support the credibility of their claims. Unverified claims by employees that they speak for others is not a sufficient basis for an employer's reasonable good faith doubt about union support where there are no other reliable indicia of employee attitudes.

Nor do we agree with the Hospital that the filing of the decertification petition justified withdrawing recognition from the Union. The Board has adopted the rule that the filing of a decertification petition does not by itself provide sufficient basis for doubt about a union's continued majority status. *Dresser Industries, Inc.*, 264 N.L.R.B. 1088 (1982) (*Dresser*). In *Dresser*, the Board concluded that an incumbent union's presumption of continued majority status is weakened if an employer is permitted to withdraw recognition from a union solely on the basis of a filing of a decertification petition. *Id.* at 1089. A decertification petition, wrote the Board, "in no way reflects, or purports to reflect, the sentiment of the unit majority." *Id.* at 1088. We find this

rationale persuasive and we therefore defer to the Board policy on this issue.[4] We hold that the Hospital did not have a reasonable good faith doubt that the Union had lost majority support in the bargaining unit that could justify its withdrawal of recognition from the Union. The Hospital's action thus constituted an unfair labor practice.

We next consider the issue of the Hospital's unilateral change in health insurance benefits for employees in the bargaining unit. There is no dispute that the Hospital changed health insurance benefits within days of withdrawing recognition from the Union and, necessarily, without consulting the Union. Because we have determined that withdrawing recognition from the Union was improper, we conclude that the Hospital had a continuing obligation to bargain. Thus, the Hospital's unilateral change in health insurance benefits constituted an unfair labor practice.

The Hospital also apparently concedes that even before the dispute over recognition of the Union, it had made unilateral changes in its maternity leave policy. The Hospital raises as a defense the argument that the charges were *de minimis* and not of sufficient gravity, therefore, to justify a remedial order. The Board in its decision concluded to the contrary, holding that the changes in the maternity leave policy were substantial and not *de minimis*. This factual finding will be upheld if supported by substantial evidence in the record. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490 (1951). We have carefully reviewed the record and briefs and we find substantial support for the Board's conclusion that the changes in the Hospital maternity leave provisions were not *de minimis*. We therefore conclude that

4. *Dresser Industries, Inc.*, 264 N.L.R.B. 1088 (1982) (*Dresser*), expressly overrules the Board's prior rule, set out in *Telautograph Corp.*, 199 N.L.R.B. 892 (1972) (*Telautograph*), that the filing of a decertification petition justifies an employer's refusal to bargain with an incumbent union. 264 N.L.R.B. at 1089. We deferred to the *Telautograph* rule in *National Cash Register Co. v. NLRB*, 494 F.2d 189, 194 (8th Cir. 1974) (*National Cash Register*), and *Royal Typewriter Co. v. NLRB*, 533 F.2d 1030, 1037 (8th Cir. 1976) (*Royal Typewriter*). In view of the change in Board policy expressed by *Dresser*, *National Cash Register* and *Royal Typewriter* can no longer be considered controlling in this circuit.

the Hospital committed an unfair labor practice in unilaterally changing its maternity leave policy.

Accordingly, the petition for review is denied and the Board's order is enforced. *See* 8th Cir. R. 14.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX "B"

DeJB

279 NLRB No. 39

D—3619
Lincoln, NB

UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRYAN MEMORIAL HOSPITAL

and

Cases 17—CA—11477
17—CA—11681

NEBRASKA NURSES ASSOCIATION
Affiliated with AMERICAN
NURSES ASSOCIATION

DECISION AND ORDER

On 12 December 1984 Administrative Law Judge Irwin H. Socoloff issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Bryan Memorial Hospital, Lincoln, Nebraska, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. 9 April 1986

Patricia Diaz Dennis, Member

Wilford W. Johansen, Member

Marshall B. Babson, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

JD—469—84

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

BRYAN MEMORIAL HOSPITAL

and

Cases 17—CA—11477
17—CA—11681

NEBRASKA NURSES ASSOCIATION
affiliated with AMERICAN NURSES ASSOCIATION

Naomi L. Stuart, Esq.
Kansas City, KN, for the
General Counsel.
Robert R. Gibson, Esq.,
Lincoln, NB, for the
Charging Party.
William A. Harding, Esq., and
A. Stevenson Bogue, Esq.,
Lincoln, NB, for the Respondent.

DECISION

Statement of the Case

IRWIN H. SOCOLOFF, Administrative Law Judge: Upon charges filed on February 9, June 22, June 30 and August 4, 1983, by Nebraska Nurses Association affiliated with American Nurses Association, herein referred to as the Union, against Bryan Memorial Hospital, herein called the Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 17, issued a Complaint dated March 31, 1983, and an Order Consolidating Cases and Consolidated Complaint dated August 12, 1983, alleging violations by Respondent of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended, herein called the Act.

Respondent, by its Answers, denied the commission of any unfair labor practices.

Pursuant to notice, trial was held before me in Lincoln, Nebraska, on October 31 and November 1, 1983, at which the General Counsel, the Charging Party and the Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to introduce evidence. Thereafter, the parties filed briefs which have been duly considered.

Upon the entire record in this case, and from my observations of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction

Respondent is a nonprofit Nebraska corporation engaged, at its Lincoln, Nebraska, location, in the operation of a health care facility. Annually, Respondent, in the course and conduct of its health care operations, derives gross revenues in excess of $250,000 and purchases goods and services, valued in excess of $50,000, directly from sources located outside the State of Nebraska. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. Labor Organization

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. Background

On March 8, 1982, the Union was certified as the collective-bargaining representative, in a nurses unit, of some 400 employees working at Bryan Memorial Hospital. Thereafter, the parties engaged in negotiations but complete agree-

ment was not reached. On March 31, 1983, the Regional Director for Region 17 issued a Complaint in Case 17—CA—11477, alleging that Respondent violated the Act by making unilateral changes in its maternity leave policy. On May 9, Respondent signed a unilateral settlement agreement concerning the matters raised in that Complaint, and the agreement was approved by the Regional Director on May 24, 1983. It provided that Respondent bargain with the Union; revoke, at the request of the Union, changes made in the maternity leave policy; make certain employees whole for losses caused by the changes in policy and post a notice for 60 days. The agreement contained a non-admission clause.

Before the posting period provided for in the settlement agreement had begun, Respondent, on June 20, 1983, withdrew recognition from the Union. Thereafter, on August 8, based upon refusal to bargain allegations contained in Case 17—CA—11681, the Regional Director withdrew his approval of the settlement agreement in Case 17—CA—11477.

In the instant consolidated matter, the General Counsel contends that Respondent violated Section 8(a)(5) of the Act by making unilateral changes in existing maternity leave policy and practices, commencing in mid-1982 and continuing to February, 1983. The General Counsel asserts that Respondent further violated the Act by its June 20, withdrawal of recognition from the Union, and, thereafter, by making unilateral changes in the insurance coverage of the bargaining unit employees, on or about July 1, 1983. Respondent claims, essentially, that any change in maternity leave policy was de minimus. It further contends that the withdrawal of recognition was based upon objective evidence, justifying a good-faith doubt of the Union's continued majority status, and that the change in insurance benefits occurred after recognition had been validly withdrawn.

B. Facts[1]

At all times material herein, Respondent has maintained a written leave of absence (LOA) policy[2] which, on its face, covers, inter alia, absences due to pregnancy. Thus, the policy provides that "an employee may take an LOA due to pregnancy. Pregnancy should be treated the same as an LOA for extended illness."

Despite the terms of the written policy, Respondent, historically, has applied a much more liberal policy toward absences due to pregnancy. Thus, as detailed below, Respondent's unwritten practice concerning maternity leave has afforded employees, in their discretion, the right to take up to 90 days' leave. The right to take the full 90 days has not been dependent upon a showing of physical disability, approval of a supervisor or the staffing requirements of the hospital. Moreover, Respondent has not required employees on maternity leave to produce doctors' notes or excuses and, upon their return to work, has placed them back at their former job positions. In addition, employees absent from work for this reason have been permitted to use accrued sick leave and to choose between taking their sick leave in blocks of 24 hours per week or 40 hours per week.[3] Also, pregnant full-time employees have been allowed, late in pregnancy, to transfer to part-time status and, then, prior to delivery, to transfer back to full-time status, thus allowing them to use accrued sick leave during maternity leave.[4]

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1. The fact-findings contained herein are based upon a composite of documentary and testimonial evidence introduced at trial. The record is generally free of significant evidentiary conflict.

2. It is undisputed that, on September 28, 1982, Respondent, unilaterally, instituted a new leave of absence policy. The new policy was rescinded one week later, on October 7, 1982.

3. The advantage to the employee in taking sick leave in 24-hour blocks, thus "stretching out" use of accrued sick leave, is that, until accrued sick leave is exhausted, the hospital continues to pay health insurance premiums on behalf of the employee.

4. Only employees in full-time status can use accrued sick leave.

Employee Colleen Olson was on maternity leave from August 26, 1982, until October 7, 1982. She testified that, in early June, she talked to payroll supervisor Brettman about taking maternity leave. Brettman told her that, pursuant to policy, she could take either 6 weeks or 3 months' time, beginning with the date of delivery. Olson was further advised that she would be able to use her accrued sick leave, vacation time and holidays in 24 hours per week or 40 hours per week increments. If she chose 40-hour increments, she would use up her leave time more quickly and, then, have to make her own insurance payments.

Later in June, Olson testified, she advised her supervisor, Maziarski, that she desired to take maternity leave of 3 months, and to use her accrued leave in blocks of 24 hours per week. Maziarski completed the necessary paper work. However, on June 24, he told Olson that there was some question about taking 3 months' leave. In July, Olson was advised by Maziarski that the maternity leave policy was, itself, in question.

Olson met with Respondent's Director of Human Resources, Jerry Sellentin, at the end of July, 1982. Sellentin, Olson testified, told her that, in the past, Respondent had been quite lenient about maternity leave but, that, now, it was going to "try and tighten up." He further stated that while Olson could "probably" have 3 months' leave, to take same, she would need the permission of her supervisor for an extended leave of absence. Further, under the leave of absence policy, Respondent was not required to place her in the same job upon her return. Sellentin also told Olson that she would have to take her accrued leave in blocks of 40 hours per week and, when this was exhausted, she would be required to pay health insurance policy premiums herself.

In August, 1982, Olson requested a maternity leave period of 6 weeks. She testified that she did so in order not to jeopardize her job position.

Nurse Tamela Mar took maternity leave starting in August, 1981. She did not, she testified, request a specific period of leave but, rather, was routinely scheduled for 3 months' leave by the hospital. When she returned, she was placed back at the same job. She was not required to submit a physician's note.

Mar testified that, preceding her second maternity leave period, on January 11, 1983, her supervisor, Wendelin, told her that the hospital would be short of nurses in May. Wendelin stated that everyone assumed that maternity leave was for 3 months but, if fact, it was for 6 weeks. In order to have 3 months, an employee had to submit a doctor's statement. Later, Wendelin showed the leave of absence policy to Mar. On January 12, at a staff meeting conducted by Wendelin, Mar brought this matter up. Wendelin again said that, absent a medical reason for a longer period, documented by a physician's note, maternity leave could not exceed 6 weeks.

Although Mar was, in fact, scheduled by Respondent for a 90-day maternity leave period, she was at no time, she testified, so advised by the hospital. Rather, she learned of the length of her leave, after delivery, by checking the posted work schedules.

Employee Roxanne Stewart took maternity leave beginning May 1, 1983. She testified that, in December, 1982, she asked her supervisor, Ashman, how much time she could take for purposes of maternity leave. Ashman stated that maternity leave was for 6 weeks and that leave in excess of that period was treated as an extended illness covered by the leave of absence policy. Ashman told Stewart that she would need a doctor's statement and that she had to use accrued sick leave in 40-hour per week increments. Ashman further commented that the policy had not changed; they were just enforcing it. On January 28, 1983, Ashman similarly advised Stewart, adding that if Stewart applied for an extended leave of absence, beyond the 6 weeks of maternity

leave, disposition of the application would depend upon the staffing requirements of the hospital.

Stewart testified that, on February 1, Ashman told her that she, Ashman, had been instructed to handle maternity leave as she had done in the past. Therefore, Ashman told Stewart, she would have to give her the 90 days.

Stewart understood from Ashman's earlier statements that she, Stewart, would be required to use her sick leave in 40-hour blocks. Therefore, as this would mean exhausting her accrued sick leave during the first month, Stewart, before departing on maternity leave, prepaid insurance premiums covering the second and third months. After beginning her leave, the employee was advised by supervisor Mitchell that she could use sick leave in 24-hour per week increments. Stewart elected to do so and her prepayments for health insurance were refunded.

Nurse Judy Mason testified that she took maternity leave early in 1982. While offered a period of 3 months, she chose to take 7 weeks. She returned to the same job and was not required to produce a medical note.

Mason credibly testified that, prior to her second maternity leave, in November, 1982, she was told by her supervisor, Walvoord, that the policy had changed and that maternity leave was for a period of 6 weeks, not 3 months. Walvoord repeated this assertion to Mason, and two other pregnant nurses, in December, adding that, if complications arose, or the employee could not be at work, at any time, a medical note was required.[5] Accordingly, Mason took 6 weeks of leave following delivery. When she returned, she produced a doctor's certificate.

Employee Rebecca Waldo took a 90-day maternity leave in 1976, and returned to her former job. During her second pregnancy, she testified, in June, 1982, she asked Supervisor

5. To the extent that Walvoord's rather confused testimony differs from that of Mason, it is not credited.

Ashman about going to part-time status, on August 23, and then returning to full-time status prior to her expected October, delivery, as had been done in the past. The request was granted. In late September, or early October, Ashman told Waldo that she would be the last person allowed to do this.

One week later, Waldo testified, Ashman told her that there was a possibility that she, Waldo, would be called back after 6 weeks of maternity leave. Waldo replied that, in the past, maternity leave had been for a 90-day period. Ashman said that the supervisors always had had the right to call employees back, as needed. If an employee was called back, and did not return, Ashman said, her job might not be there when she did come back to work. Ashman added that hospital staffing needs probably would allow for Waldo to take 90 days of leave and that she, Ashman, wanted, or requested, that Waldo use her sick leave in 40-hour per week blocks. Ashman added that Waldo would need to submit medical notes upon leaving for, and returning from, maternity leave. She stated that that had always been the policy but, now, Respondent was enforcing it.

Waldo took 90 days' maternity leave and used her sick leave in 40-hour per week increments. She returned to her former position after producing a doctor's note.

Nurses Kathleen Kucera and Vickie Danek testified that, on February 14, 1983, they were told by their supervisor, Maziarski, that he was limiting their maternity leave to 6 weeks, because of staffing problems. He threatened to replace them if they took a longer period of time. However, shortly thereafter, at a staff meeting, Maziarski informed them that, under maternity leave policy, they could take 90 days' leave. Both chose to take some 9 weeks.

On May 31, 1983, a decertification petition was filed with the Board by a group of unit employees calling themselves

"Concerned Employees for a Better Bryan." On June 1, Respondent's attorney, William Harding, sent a letter to Thom Cope, attorney for the dissident employees, seeking any information "indicating that the Nebraska Nurses Association no longer enjoys the support of a majority of the employees within the bargaining unit." Cope replied on June 2, stating that the decertification petition was supported by substantially more than 30 percent of the unit employees. He further claimed to have contacted almost every employee by telephone which revealed that a majority "do not want the union." On June 6, Harding sent another letter to Cope stating that "I am uncertain that the hospital possesses sufficient information to warrant a conclusion that the union does not continue to enjoy the support of a majority," and seeking any additional information which would justify withdrawal of recognition. Thereafter, on June 20, Cope sent a letter to Harding with enclosures of "affidavits from several members of the bargaining unit which indicate that a majority of the unit does not want the Nebraska Nurses Association to represent them or wants a new election. We will not specifically divulge the names, because they have sought and will receive anonymity."

The June 20, letter, was accompanied by 11 form affidavits, reading, as follows:

> _____, being first duly sworn on oath deposes and says that she is a member of the bargaining unit at Bryan Memorial Hospital.
>
> That she has personally spoken to or communicated with those individuals listed in Exhibit A, which is herein incorporated by reference as though fully set forth herein.
>
> That _____ of the people listed in Exhibit A have told her that they no longer wanted the Nebraska Nurses Association (C.A.R.E.) to represent them, or that they wanted a new election.
>
> That affiant can identify those individuals, but chooses not to do so, because they have expressed a desire for anonymity and confidentiality, and therefore affiant will not disclose their names at this time.

Further affiant sayeth not.

The affidavits, taken together, claim, on their face, that some 225 of the approximately 379 unit members no longer desire representation, or want a new election.

Following receipt of this letter, on June 20, Respondent withdraw recognition from the Union. At trial, the parties stipulated that the basis of Respondent's action was its receipt of the foregoing letter from Cope. Thereafter, on or about July 1, 1983, Respondent, unilaterally, made changes in its health insurance plan for bargaining unit employees.

C. Conclusions

It is not disputed that the Union at no time agreed to implementation of changes in maternity leave policy. The parties further agree that Respondent never notified the Union that changes in maternity leave policy would be implemented. As shown in the statement of facts, Respondent did institute changes in maternity leave policy during the mid-1982, to February, 1983, period, and those unilaterally instituted changes were substantial, albeit, they were applied in a less than uniform and clear manner. The changes in policy had the effect of sharply decreasing the time available for maternity leave; requiring employees to produce a physician's note; conditioning leave upon supervisory approval and Respondent's staffing requirements; subjecting employees on maternity leave to the possibility of being displaced from their jobs; limiting the options available to employees in the use of their accrued sick leave while on maternity leave and limiting employees' previously available rights to transfer between full-time and part-time status. Such changes in terms and conditions of employment are substantial and not de minimus. By instituting, unilaterally, changes in its maternity leave policy, Respondent violated Section 8(a)(5) of the Act.

I further find that, on June 20, 1983, when it withdrew recognition from the Union, Respondent violated Section 8(a)(5) of the Act. In reaching this conclusion, I reject the contention that the June 20, letter, from the dissident employees' attorney to Respondent's attorney, presented Respondent with objective considerations justifying a good-faith doubt of the Union's continued majority status. For the enclosed affidavits may be viewed, only, as sufficient to convey to Respondent the views of the 11 affiants, and not the views of unnamed other employees. It is well settled that employer receipt of employees' unverified assertions, that the majority of employees no longer support their union representative, is insufficient to create "a reasonably based conviction that the claimed desire of those employees to be rid of the union" is factual. Cornell of California, Inc., 222 NLRB 303 (1976).[6] Moreover, in this case, the affidavits, on their face, do not assert that a majority no longer want representation. Rather those documents claim, only, that a majority either do not want continued representation or desire to have an election.

Having found that Respondent unlawfully withdrew recognition on June 20, 1983, it follows that, on or about July 1, when it unilaterally instituted changes in its health insurance plan for bargaining unit employees, Respondent further violated Section 8(a)(5) of the Act. I so find and conclude.

IV. The Effects of the Unfair Labor Practices Upon Commerce

The activities of Respondent set forth in Section III, above, occurring in connection with its operations described in section I, above, have a close, intimate and substantial relation to trade, traffic and commerce among the several

6. See, also, *Dalewood Rehabilitation Hospital, Inc.*, 224 NLRB 1618 (1976).

states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The Remedy

Having found that Respondent has engaged in certain unfair labor practice conduct in violation of Section 8(a)(5) and (1) of the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Conclusions of Law

1. Respondent, Bryan Memorial Hospital, is an employer engaged in commerce, and in operations affecting commerce, within the meaning of Section 2(2), (6) and (7) of the Act.

2. Nebraska Nurses Association affiliated with American Nurses Association, is a labor organization within the meaning of Section 2(5) of the Act.

3. The certified unit of nurses employed by Respondent constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. At all times material herein the Union has been, and is now, the exclusive representative of all employees in the aforesaid bargaining unit for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing to recognize and bargain with the Union, as exclusive representative of the bargaining unit employees, concerning rates of pay, wages, hours and other terms and conditions of employment, Respondent has engaged in unfair labor practice conduct within the meaning of Section 8(a)(5) of the Act.

6. By making unilateral changes in its maternity leave policy and its health insurance plan for bargaining unit em-

ployees, Respondent has engaged in unfair labor practices conduct within the meaning of Section 8(a)(5) of the Act.

7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Upon the foregoing findings of fact, and conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:[7]

ORDER

Respondent, Bryan Memorial Hospital, Lincoln, Nebraska, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with Nebraska Nurses Association affiliated with American Nurses Association as the exclusive bargaining representative of its employees in the certified unit of nurses.

(b) Making unilateral changes in the terms and conditions of employment of the bargaining unit employees.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain with the Union as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours and other terms and conditions of employment, and, if an un-

7. In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions and Order, and all objections thereto shall be deemed waived for all purposes.

derstanding is reached, embody such understanding in a signed agreement.

(b) Upon request of the Union, rescind the unilateral changes made in the maternity leave policy and the health insurance plan for bargaining unit employees.

(c) Make the unit employees whole for any losses they may have suffered as a result of the unilateral changes in terms and conditions of employment, with interest thereon to be computed in accordance with Florida Steel Corporation, 231 NLRB 651 (1977). See, generally, Isis Plumbing & Heating Co., 138 NLRB 716 (1962).

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Lincoln, Nebraska, facility, copies of the attached notice marked "Appendix."[8] Copies of said notice, on forms provided by the Regional Director for Region 17, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced or covered by any other material.

(f) Notify the Regional Director for Region 17, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith,

8. In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Dated, Washington, DC December 12, 1984

Irwin H. Socoloff
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

(SEAL) (SEAL)

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours and other terms and conditions of employment with NEBRASKA NURSES ASSOCIATION affiliated with AMERICAN NURSES ASSOCIATION, as the exclusive bargaining representative of our employees, in the certified unit of nurses.

WE WILL NOT make unilateral changes in the terms and conditions of employment of the bargaining unit employees.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain with the Union as the exclusive representative of all employees in the appropriate unit with respect to rates of pay, wages, hours and other terms and conditions of employment, and, if an agreement is reached, WE WILL embody such agreement in a signed contract.

WE WILL, upon request of the Union, rescind the unilateral changes made in the maternity leave policy and the health insurance plan for bargaining unit employees.

WE WILL make employees whole for any losses they may have suffered as a result of the unilateral changes in terms and conditions of employment, plus interest.

BRYAN MEMORIAL HOSPITAL
(Employer)

Dated _____ By _____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Tower II Building, Gateway Centre—Room 616, Fourth at State, Kansas City, KS 66101 (Tele. No. 913-236-3866).